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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 115...

LUCKENBACH TERMINALS, INC., a corporation of the State of New Jersey,

Appellant,

v.

TOWNSHIP OF NORTH BERGEN IN THE COUNTY OF HUDSON, a municipal corporation of the State of New Jersey, NEW JERSEY JUNCTION RAILROAD COMPANY, a corporation of New Jersey, THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation, COUNTY OF HUDSON, a municipal corporation of the State of New Jersey,

Appellees.

APPEAL FROM NEW JERSEY COURT OF ERRORS AND APPEALS.

BRIEF IN OPPOSITION TO THE MOTION MADE BY THE APPELLEE TOWNSHIP OF NORTH BERGEN TO DISMISS THE APPEAL OR TO AFFIRM THE DECREE.

CLARENCE KELSEY,
Counsel for Appellant.

The Court Press, 150 Bay St., Jersey City, N. J.

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I.

Status of Case.

The application to the Supreme Court of the United States for allowance of an appeal in this case was made on April 11, 1940, to the chief justice of New Jersey, and

he refused because the remittitur had before that date gone down from the highest court in the state to the trial court and he said he was without power. Application next was made, on April 13, 1940, to Mr. Justice Roberts, who, after he had conferred with one of the other Justices of the Supreme Court, declined to allow the appeal. On April 19, 1940, an application was made to Mr. Justice Frankfurter who allowed the appeal.

The appeal is from a final decree rendered in the New Jersey court of errors and appeals in the last resort in all causes on January 25, 1940, and from each and every part thereof, but the record and proceedings having the same day been remitted to the court of chancery of New Jersey, the clerk of that court was ordered to prepare, certify and transmit the record to the Supreme Court of the United States within forty days of April 19, 1940.

The original papers were, on April 19, 1940, served upon Edward L. Whelan, the clerk of the court of chancery of New Jersey, and left with him, and copies were served upon the attorneys of the appellees in the state courts, including copies of the statement directing attention to the provisions of paragraph 3 of Rule 12 of the Supreme Court of the United States, all by April 24, 1940.

On May 3, 1940, a *praecipe* for the transcript of the record was served upon the attorneys for the appellees, and the original was filed on that day with the clerk of the court of chancery of New Jersey.

On May 7, 1940, a statement against the jurisdiction of this Court, including a motion to dismiss or affirm was served upon me, by the appellee Township, and I am to file this brief in opposition to the motion thus made (Rule 7, par. 3).

II.

Unconstitutionality of Apportionment Act.

Manifestly, the statute of New Jersey, which we have called the Apportionment Act (Laws of New Jersey of 1919, ch. 121, p. 285 to 289, as amended by ch. 335 of the Laws of New Jersey for the year 1933, p. 879) is unconstitutional, because of a clause in section 6 thereof, *"that apportionments may be made without notice to the interested parties."* (Italics supplied.) (See pp. 1 and 2 of Statement as to Jurisdiction) and without notice given, either before or after the apportionment has been made.

Security Trust Co. v. *Lexington*, 203 U. S. 323, 333; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190; *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418, 457, 458; *Davidson* v. *New Orleans*, 96 U. S. 105. In *Stuart* v. *Palmer*, 74 N. Y. 183, 186, 188, held "The law requires no notice, and a provision for notice cannot be implied." 12 Corp. Jur. 1228 and 1229. And some of the cases in New Jersey, holding the same rule, are: *Mitsch* v. *Riverside*, 86 N. J. L. 603; *Clark Thread Co.* v. *Kearny*, 55 N. J. L. 50; *Grocl* v. *Newark*, 78 N. J. L. 142; *Van Solinger* v. *Harrison*, 39 N. J. L. 51.

It is unconstitutional because repugnant to Sec. 1 of the 14th Amendment to the Constitution of the United States, which reads in part as follows:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

The bill of complaint of the appellant filed in the court of chancery of New Jersey also attacked the tax sale of the lands of the appellant based on said apportionment,

and prayed that the apportionment and tax sale and certificate of tax sale be set aside and for an injunction restraining the Township from enforcing the tax sale or apportionment, and that they be declared fraudulent, *ultra vires*, illegal and void and that the title of the complainant be quieted against the lien of the certificate of tax sale asserted by the Township (R. 16 to 35).

III.

The Federal Question Was Timely and Properly Raised.

On March 11, 1937, the appellant made application to the New Jersey supreme court, on affidavits and exhibits, for a writ of *certiorari* to review the apportionment of taxes of July 5, 1933, and the tax sale of September 12, 1935, founded thereon, and was granted a rule to show cause. The apportionment could not be set aside while the tax sale stood, so the tax sale first had to be set aside or the apportionment and tax sale be set aside together. The action in the state common-law court was brought to set aside both the tax sale and apportionment. In accordance with the state statute of limitation, this was done within eighteen months after the tax sale and so within time according to state law:

> "If the application for the writ and rule to show cause were made within the eighteen months limitation, the statute is considered as fulfilled. When the rule comes to argument, it always relates back to the time it was granted."
>
> *Stevens* v. *Enders*, 13 N. J. L. 271.

The question is whether any notice is provided for by the statute (*Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333).

The grounds advanced for granting the *certiorari*, were that they were "unconstitutional", in that the apportionment was contrary to Sec. 1 of Article 14 of the Constitution of the United States, which provides, *inter alia*, "Nor shall any state deprive any person of life, liberty or property without due process of law", and also unconstitutional by the State Constitution, and that the application was founded on about twelve other good and valid grounds.

The federal ground of "unconstitutionality" could not very well be set forth in the affidavits or exhibits used in making the application for the writ and therefore it appears in the brief filed by the applicant with that court. This same course was adopted in *People ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 68, 69.

SUBMITTED TO THE STATE SUPREME COURT.

Under the first point, on pages 5 to 7 of the brief, the following appears: "The statute of 1919 providing for apportionments and reapportionments of taxes is unconstitutional. • • • Chapter 121 of the Laws of New Jersey for the year 1919 • • • is unconstitutional. Section 6 of this statute provides in part:

> "Such apportionment may be made without notice to the interested parties, but in such case any interested party who did not waive notice may apply for a reapportionment on notice; and Section 1 of Article 14 of the Constitution of the United States provides, *inter alia*, 'Nor shall any state deprive any person of life, liberty or property, without due process of law'."

In *Reeves* v. *Jones*, 74 N. J. L. 330, it was held that:

> "No question of laches is involved upon the issuance of a writ of *certiorari* at any time during the period prescribed by the statute."

In deciding the application, the state supreme court wholly disregarded the claims of the applicant that the statute of 1919 was unconstitutional, and held that the applicant was guilty of *laches* in making its application (118 N. J. L. 348, 350) and said that "on July 5, 1933, the taxes were apportioned on the basis of the new holdings," which would be impossible as the opinion shows that such new holdings were not acquired until April, 1934, nearly nine months after the apportionment. We say "impossible", because the illegal Act of 1919 provides in its fourth section (p. 2 of Statement as to Jurisdiction) that:

> "4. The apportionment shall be made according to the value of the respective subdivisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of said parcel,"

and the preceding Act for apportionment of taxes was sec. 31 of the *General Tax Act* of 1903 (P. L. 1903, ch. 308, p. 394), which was repealed by the *General Tax Act* of 1918, but provided, in said sec. 31, "that taxes may be apportioned among proper subdivisions of such parcel * * * according to the values of the respective subdivisions at the time the tax became due, * * * the tax on each subdivision shall be a lien thereon in the same manner as originally assessed."

The opinion of the state supreme court is replete with errors of fact as well as of law and was inapplicable. It says that "the applicant obtained additional ripa land", which is not so, and retained a five-foot fringe of ripa along the river, which is true, but it was not procured or retained until nearly nine months after the apportionment of July 5, 1933. The applicant got the deed conveying the triangular tract of land, dated February 14, 1934, which included the five-foot fringe of ripa (Ex. C, 5,

R. 278 to 287) on March 8, 1934. The opinion further says, that the state claimed title to the accretion. There was no accretion for the state to claim title to and they made no claim to any. Then the opinion goes on to treat the lands as though the applicant, at the time of the apportionment, had already made the changes, but, they were, in fact, made about nine months *after* the apportionment. We find that the applicant went to the railroad companies in October, 1933, four months after the apportionment, and made an entire new deal (R. 163, 164). In fact, down to the time of the change in March, 1934, the applicant knew nothing about an apportionment of its lands having been made (R. 164) and did not learn the result of the apportionment until February, 1937.

And the court finished its opinion by saying that "it appears to us that, upon the showing made, the apportionment was not unfair to applicant." The opinion holds that it was not until April, 1934, that applicant received knowledge of the apportionment—nearly nine months after the actual apportionment—by receiving amended tax bills, but it did not seek a reapportionment provided by Sec. 6 of the 1919 act, and see Sec. 9 of the Apportionment Act of 1919 (Statement as to Jurisdiction, 2) which requires a deposit of a sum sufficient to pay the estimate apportionable to the sub-division in which the applicant is interested. The application for a *certiorari* as to this riparian plot was refused, and although the highest court of the state held, as to the effect of refusing a writ of certiorari, in *State* v. *Wood*, 23 N. J. L. 560, 561.

> "that where the state supreme court refuses to grant the writ the decision rests in the discretion of the court and cannot, in any technical or appropriate sense, be denominated *final*. There the court refused to take cognizance of a matter in controversy, and

> they decided not to examine the questions of law arising between the parties; they passed no definite sentence and settled no right. The court further said that 'the matter in controversy cannot be said to be *res adjudicata;* the decision of the court cannot be pleaded, nor relied upon in any way, as a former judgment and the question at issue may be again agitated before the same or a coordinate tribunal. * * * There is a wide and obvious distinction, which no argument can render more clear, between the refusal to entertain a cause, and the rendering of a final judgment upon the matter at issue."

A reference to the following cases, reported in New Jersey, showed that a bill in chancery would lie in such a case:

Bogert v. *Elizabeth*, 27 N. J. Eq. 568; *Kirkpatrick* v. *New Brunswick*, 40 N. J. Eq. 46 (affirmed 41 N. J. Eq. 347); *Smith* v. *Cohen*, 123 N. J. Eq. 419; *Commercial Co.* v. *Southern Surety Co.*, 100 N. J. Eq. 92 (affirmed 101 N. J. Eq. 738).

In *Welles* v. *Schaffer*, 98 N. J. Eq. 31, 33, Vice-Chancellor Backus held that an attack on a certificate of tax sale, if the certificate is voidable, must be made by *certiorari;* if it is void, by ejectment, bill to remove the cloud or bill to quiet title.

Paragraph 31 of the bill of complaint filed in the court of chancery, September 13, 1937 (R. 29) avers that said act (of 1919) is unconstitutional for the following reasons, among others; "It also provides that an apportionment may be made without notice to the interested parties". And paragraph 32 of the bill avers that "no notice of said apportionment was given to the complainant, or waived by it, either before or after said apportionment was made, and

complainant had no knowledge of the results thereof until the discovery on said February 25, 1937, of the said certified copy of resolution, Exhibit G" (R. 29, 30).

The above allegation that "It also provides that an apportionment may be made without notice to the interested parties", referred to the "due process of law clause" in the Federal Constitution, because the State Constitution does not contain a clause like the "due process of law clause" in the Federal Constitution (*Abendroth* v. *N. Y. Elev. R. Co.*, 54 N. Y. Supr. Ct. 417; *Maxwell* v. *Goetschius*, 40 N. J. L. 391), and page 30 of the typewritten brief filed with the trial court on behalf of complainant is under the following heading:

> "Said apportionment was made under the provisions of Chapter 121 of the Laws of New Jersey for the year 1919, entitled 'An act for the apportionment of assessments for taxes and other municipal assessments, charges or liens', approved April 11, 1919, as amended by chapter 335 of the Laws of New Jersey for the year 1933; and said Acts are unconstitutional; and said apportionment was made without notice to the complainant;" (See *Gibes* v. *Zimmerman*, 290 U. S. 326, 328.)

And on page 29 of the brief filed with the trial court, under said heading, appears the statement, "We also contend said Apportionment Act, chapter 121 of the laws of 1919, is unconstitutional because it provides, in Section 6 thereof, that such apportionment can be made without notice to the interested parties" and again on page 30 of the brief, under said heading, appears the averment that "Section 1 of Article 14 of the Constitution of the United States provides, *inter alia*, 'Nor shall any State deprive any person of life, liberty or property, without due process of law' ".

No oral argument was allowed at the conclusion of the hearing and the final argument was made by brief only.

There was offered to the vice-chancellor, in the course of the argument to dismiss the bill, made at the beginning of the trial, the record of the case in the supreme court and the briefs filed in that case, and he received them (R. 82); and the claim was made by the complainant during the trial that the statute of 1919, constituting the Apportionment Act, was unconstitutional, during which argument the solicitor for the Township said, "That argument was considered and the matter decided adversely" (R. 161). He must have meant only that the charge of unconstitutionality had been "considered by the state supreme court and by that court decided adversely". The records of the state supreme court and the briefs therein filed were not printed with the record which went with the appeal from the court of chancery to the court of errors and appeals.

In deciding the case, the vice-chancellor said (R. 70 to 74) that the bill of complaint alleged "unfair apportionment, unconstitutionality of the Act, Ch. 121, P. L. 1919, under which the apportionment was made, and fraud on the part of the municipality. • • • Complainant's failure to prove fraud or 'corrupt design' and its laches in seeking relief compels a dismissal of the bill. This being so, it is not necessary to pass upon the constitutionality of the act;" and he dismissed the bill of complaint (R. 74).

In their answers filed in the court of chancery, both defendants, the Township and County, alleged that "notice of such apportionment was given to the complainant in April, 1934" (R. 48, par. 23; 56, par. 23; and 49, par. 41).

The petition of appeal to the court of errors and ap-

peals specifies, as a ground of appeal, that the decree of the court of chancery of New Jersey is erroneous in that it adjudges that complainant's bill of complaint be dismissed, whereas said bill avers, that "The statute under which said apportionment was made is chapter 121 of the Laws of New Jersey for the year 1919 (P. L. 1919, p. 285) entitled 'An Act for the apportionment of assessments for taxes and other municipal assessments, charges or liens', as amended by chapter 335 of the Laws of New Jersey for the year 1933, and the defendants admitted at the trial that said apportionment was made under said laws" (R. 29), and that the bill alleges that said act of 1919 is unconstitutional for the following among other reasons:

> "(d) It is in derogation of Section 1 of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person of life liberty or property without due process of law, *i. e.*, said Act provides for apportionment without notice to the parties in interest being given either before or after apportionment" (R. 8 and 9).

The instant case in the appellate court was not argued orally but was submitted on brief. By Rule 9 of the court of errors and appeals, adopted at the February term, 1932, it is provided that all causes properly noticed and listed will be submitted on brief unless counsel give notice otherwise; except appeals or writs of error in all manslaughter or murder cases which shall be argued orally.

The brief on behalf of the appellant (at p. 4) said:

> "I also claim that said statute of 1919, in providing that an apportionment can be made without notice to the interested parties, is repugnant to that part of Section 1 of the 14th Amendment to the Constitution

of the United States which provides: 'Nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law'."

Under the heading on page 38:

"The apportionment of the taxes against Plot 4 A, Block 438 C, and the Tax Sale founded thereon, are unconstitutional, ultra vires, illegal and void for the Following Reasons:

(A) Because the statute under which said apportionment was made is unconstitutional.

Sub-division (A) reads:

"Said apportionment was made under the provisions of Chapter 121 of the Laws of New Jersey for the year 1919, entitled 'An Act for the Apportionment of assessment for taxes and other municipal assessments, charges or liens', approved April 11, 1919, as amended by Chapter 335 of the Laws of the year 1933; and said laws are unconstitutional and said apportionment was made without notice to the appellant".

The brief, further considering the constitutional question, says (at p. 42):

"I also contend said Apportionment Act, Chapter 121 of the laws of 1919, is unconstitutional because it provides, in Section 6 thereof, that *'such apportionment may be made without notice to the interested parties'*."

"If the foregoing is the law it would appear that without notice to or knowledge by an owner, his lands can be subdivided for purposes of taxation, and that assessments of taxes already levied against them can be apportioned without his knowledge or consent in such way that one

subdivision will be re-assessed by the apportionment for more than it should bear while the other subdivision is thereby released from a greater part of the burden, and that, no matter how long a time intervenes between the apportionment and knowledge thereof gained by the owner of a subdivision, and no matter to what extent he has been wronged by the apportionment, in order to obtain a reapportionment he must, by Section 9 of the Apportionment Act, if the governing body of the municipality requires it, deposit with his application various sums of money including sufficient to pay the estimated amount of taxes apportionable to the subdivision in which he is interested. As to how and by whom this estimated amount is to be determined at the time the application for a reapportionment is filed, the statute is silent; and why an owner who has been wronged by an unfair apportionment should be compelled to pay his taxes, sooner than he otherwise would be required to, as a condition to obtaining a just reapportionment, is not disclosed."

"Section 1 of Article 14 of the Constitution of the United States provides, *inter alia*, 'Nor shall any State deprive any person of life, liberty or property, without due process of law.'"

"Section 12 of Section 7 of Article 4 of the Constitution of New Jersey, as amended, provides that 'Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value'."

"Section 31 of the General Tax Act of 1903 (P. L. 1903, Chap. 208, p. 394), required a notice to be given all owners of a parcel of land of a proposed apportionment of taxes assessed against it."

"Manifestly this statute of 1919 is upon its face unconstitutional, and the attempted apportionment in the instant case, based thereon, is illegal and should be set aside. Our bill alleges, in paragraph 32 thereof, and the resolu-

tion (Exhibit C-8, pp. 309-310) passed on July 5, 1933 by the Commissioners of North Bergen, and the testimony of Mr. Mewhinney (p. 140) and of Mr. Stefferson (pp. 145 and 146), show that no notice of the proposed apportionment was given to or waived by the appellant, and that it was attempted and intended by said apportionment to deprive the complainant of its property without due process of law."

"The act fails to provide for notice to the landowner, and, indeed, it provides by section 6 thereof, that apportionments may be made without notice to the parties in interest."

Corpus Juris has this to say about such an act (vol. 12, pp. 1228 and 1229):

> "Where boards or commissioners act in a judicial or *quasi*-judicial capacity, notice is necessary to render their order due process of law. The law authorizing the proceedings must require notice or it will be unconstitutional. It is not enough that a person may by chance have notice, or that he may, as a matter of favor or courtesy, have a hearing. • • • Under this view the statute is not unconstitutional unless it undertakes to dispense with notice. Other cases hold that the statute itself must specifically require notice, or otherwise it authorizes proceedings without notice, and is therefore unconstitutional."

Note 27 to the above quoted text cites the case of *Stuart* v. *Palmer*, 74 N. Y. 183, which holds (at p. 186):

> "The law requires no notice, and a provision for notice can not be implied".

and (at p. 188):

> "I am of the opinion that the constitution sanctions no law imposing such an assessment, without a

notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by a chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it but what may, by its authority, be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

Another case cited in *Corpus Juris* is *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, in which Mr. Justice Pitney wrote the opinion of the court, and said (at pp. 422 and 423):

> "Thus construed, and as applied in this case, we think section 2677 is repugnant to the 'due process of law' provision of the Fourteenth Amendment, which requires at least a hearing, or an opportunity to be heard, in order to warrant the taking of one's property to satisfy his alleged debt or obligation; and in our opinion the other sections do not adequately supply the defect."

and (at p. 425):

> "Thus in *Security Trust Co.* v. *Lexington*, 203 U. S. 323-333, the court, by Mr. Justice Peckham, said with respect to an assessment for back taxes:
>
> 'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed asessment. It is not what notice, un-

> called for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute.'"

In *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, it was held that:

> "An act giving the commonwealth the power, without notice or hearing, to command a railway company to abolish a grade crossing and construct an overhead is unconstitutional as repugnant to section 1 of the Fourteenth Amendment" (Cites 134 U. S., 418 and 457-458).

The case of *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Minnesota*, 134 U. S. 418 (at pp. 457-458), the court, in holding an act unconstitutional, said:

> "It deprives the company of its right to a judicial investigation by due process of law, under the form and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes, therefor, as an absolute finality, the action of a railroad commission which, in view of the power conceded to it, by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice".

It was held in *Davidson* v. *New Orleans*, 96 U. S. 105, and in other cases which followed it, that:

> "When a law provides a mode for confirmation or contesting an assessment for taxation, with appropriate notice to the person charged, the assessment cannot be said to deprive the owner of his property without due process of law",

and the defendants will argue here, in reply, that section 6 of the Apportionment Act provides that:

> "In such case (an apportionment without notice) any interested party who did not waive notice may apply for a reapportionment on notice",

and that the appellant did not make an application for a reapportionment, and, therefore, cannot complain. But it will be noticed that by section 9 of said Apportionment Act it is further provided that:

> "Any such governing body or authorized officer *may* refuse to comply with any application for apportionment or reapportionment, unless the written application shall be accompanied by a map showing the entire parcel and the sub-divisions desired, and shall also be accompanied by the deposit of a sum sufficient to cover the expense of the notice and advertisement hereinbefore provided, and to pay the estimated amount apportionable to the subdivision in which the applicant is interested".

IV.

Consideration of Brief of Appellee.

The motion to dismiss or affirm, made by the appellee, does not clearly state the facts on which it is based, as required by Rule 7, paragraph 1.

It also states facts not of record, *i. e.* depth of water, etc.

The appellee says on this motion (See its brief, pp. 4 and 11) that a new suit was brought by it in the court of chancery of New Jersey since the decision herein by the appellate court, to foreclose the rights of the appellant in the property in question, and other property,

and that on April 8, 1940, a motion was made in behalf of the complainant in that suit to strike out the answer filed by the appellant (here), and that the appeal to the Supreme Court of the United States is manifestly taken for delay only.

The appellant says in answer that it decided back in the month of last January to make application for an appeal to the Supreme Court of the United States, and made such intention known also to the solicitors of the appellees on February 26, 1940, when the appellee moved to make the decree of remittitur of the appellate court the decree of the court of chancery, and the vice-chancellor was then asked to grant a stay pending such appeal if allowed.

But the foreclosure suit had already been commenced by the filing of a bill on February 24, 1940, which sought to foreclose not only the premises sold at the tax sale on September 12, 1935, but the valuable new ripa as well *which has never been sold for taxes* and which the solicitor of the appellee admitted having included in his bill of complaint, averring that a detailed description of the property sold by the collector of taxes included the northerly two-fifths part of the riparian tract and the five foot wide riparian fringe acquired from the state nine months after the apportionment. And, added to the description, the following appears: "Together with such rights as the Luckenbach Terminals, Inc., may have in lands under water adjoining the aforementioned tract, together with such rights as the Luckenbach Terminals, Inc., may have conveyed to the New Jersey Junction Railroad and The New York Central Railroad and to the County of Hudson.

Being also known as Lot 4 A. B. in Block 438 C on the Township Assessment Map of the Township of North Bergen in the County of Hudson."

On April 22, 1940, during the argument of a motion to strike the answer filed by the appellant in that suit, the charge was made that the solicitor of the appellee Township knew, when he filed the bill for the appellee, that the ripa acquired in April, 1934, had not been sold for taxes; and he admitted that he included that plot in the bill because he thought it should be included or something to that effect.

Because the foreclosure suit was a new suit and between other parties than those in the instant case, I refrained from mentioning these facts in any of the papers heretofore filed herein, but now that the appellee has brought it in, I am compelled to mention it. On February 24, 1940, when the bill was filed in the foreclosure suit, the solicitor for the appellee could not have known of my intention to try to get a review of the present case in the Supreme Court of the United States, and he now claims in his brief that the appeal to Washingon is "manifestly taken for delay only". The value of the real estate involved in this foreclosure suit, including the parcels attempted to be foreclosed, which were never sold for taxes, amounts to about one million dollars, and a bill filed to foreclose the equity of redemption after a tax sale is fatal if it includes more lands than were sold at the tax sale. (*Welles* v. *Schaffer*, 98 N. J. Eq. 34.)

The appellee, Township, in its brief filed on the motion to dismiss or affirm, does not say that the federal question of "due process of law" was not timely or properly raised in the state courts, but practically admits that the state courts decided the case on independent and non-federal grounds adequate to support their decision; but the appellant says that the appellee has failed to show that any of the non-federal grounds upon which the decisions of the state courts rest are tenable or broad enough to

support their decision, or that they have a fair or substantial basis.

The refusal of the state supreme court to grant the writ of *certiorari* was discretionary, non-appealable, not *res adjudicata* nor a final decision, and could not be quoted by another court as a decision. *State* v. *Wood*, 23 N. J. L. 560, 561, 562; *Post* v. *Anderson*, 111 N. J. L. 303, 304.

But both the court of chancery and the court of errors and appeals not only quoted from the decision of the state supreme court but followed it in deciding the case, and held that the appellant was guilty of such *laches* as to be unable to maintain its case, whereas the case in the state supreme court was instituted within the statutory time of eighteen months after the tax sale; and the court of chancery and court of errors and appeals decided that fraud had not been found in the case, whereas it appeared, and still does appear, that the whole riparian tract in the township was apportioned so that the southerly three-fifths part thereof was reassessed at $9,000, and the northerly two-fifths part at $496,000 per year, the apportionment thereby increasing the assessment from $202,000 to $496,000 per year on the northerly two-fifths part, and decreasing the assessment from $303,000 to $9,000 per year on the southerly three-fifths part.

The case of *State* v. *Wood*, 23 N. J. L. 560, 561, was decided in 1847, and has never been overruled, and it recently has been in part approved by our highest state court in *Post* v. *Anderson*, 111 N. J. L. 303.

In the opinion of the state supreme court (118 N. J. L. 348, 350) it is said:

> "In July, 1933, the taxes were apportioned on the basis of the new holdings. Applicant's ripa lands had been assessed at $505,000. On July 5,

1933, the assessed valuation was apportioned, $9000. to that part of the tract to be occupied by the railroad company, and $496,000. to the portion retained by the applicant. The contention of the applicant is that the entire assessment of $505,000. should have been apportioned upon the basis of lineal frontage, viz, three-fifths to the railroad company, and two-fifths to the applicant. • • • That the apportionment for the years 1930 to 1933, inclusive, was made in July, 1933, • • • and applicant received knowledge of the apportionment in April, 1934, at or immediately after the transfer of titles."

The triangular shaped piece conveyed by the State of New Jersey to the appellant on March 8th, 1934 (conveyance dated February 14, 1934, R. 278 to 287) is shown as bounded by red lines (R. 287), and the same day that it received the conveyance from the State, it conveyed to the railroad companies "a permanent and perpetual easement and right of way for the construction, maintenance and operation of the railroad" in all parts thereof but a strip five feet wide and 635 feet long on the riverward or easterly side, which it retained in order to preserve to itself the thing of value in the entire holding, namely, the preferential right to obtain a grant or lease from the state of the submerged land contiguous thereto (R. 241 to 255). This reservation is shown in the deed on page 248 of the record. These facts were admitted at the trial. So how could the state supreme court say that the apportionment of taxes on July 5, 1933, were on the basis of the new holdings acquired nine months later? Section 4 of the unconstitutional apportionment act provides that:

> "4. That the apportionment shall be made according to the value of the respective subdivisions at the time the respective charges were levied or imposed,

unless the claim is justly chargeable only to a particular part of such parcel."

This *riparian* right, on July 5, 1933, had cost the appellant at least $800,000 in addition to the taxes paid thereon from the year 1920 to 1929, inclusive, but the state court of first instance said nothing in its opinion about the constitutionality of the apportionment act of 1919, although the first point in the brief submitted to that court for the appellant contained a quotation of the "due process of law" clause as set forth in Section 1 of the Fourteenth Amendment to the Constitution of the United States, and a claim that the act was unconstitutional because Section 6 thereof provided that "apportionments may be made without notice to interested parties".

The conveyance of the additional triangular shaped tract by the State of New Jersey on March 8, 1934, could not have been and was not taken into consideration in apportioning the taxes for the years 1930 to 1933, for as we have shown at the foot of page 7 of our "Statement as to Jurisdiction", lands owned by the state are not subject to taxation, and under the prevailing *General Tax Act* (Laws of N. J. for 1918, Ch. 236, Section 501, page 862) this land after it was acquired from the state could not be assessed until October 1, 1934, for the taxes for the year 1935. So, they were not included in the apportionment of July 5, 1933, upon which the tax sale is based.

And referring to the case, quoted on page 3 of our "Statement as to Jurisdiction", of *Security Trust Co.* v. *Lexington*, 203 U. S. 325, 333, we say that part of the opinion of the state supreme court which holds, at page 351, that the appellant should have sought a reapportion-

ment under Section 6 of the Apportionment Act of 1919, does not conform thereto; in which respect the state supreme court fell into error, but an error not reviewable.

V.

Alleged Other Tenable Grounds Did Not Exist.

Then again, the question of *laches*, decided by the state supreme court, at page 351 of its opinion: It is clear that a tax sale having intervened on September 12, 1935, at which the two-fifths northerly part of the riparian lands, retained by the appellant after the apportionment, was sold, nothing could be done after that about a reapportionment until the tax sale was reopened, for while the tax sale stood, there could be no reapportionment. As a general principle, *laches* is not a bar where a tax is assessed in violation of constitutional rights, or if the tax is otherwise a void lien, *Mitsch* v. *Riverside*, 86 N. J. L. 603, 610; *Walsh* v. *Newark*, 78 N. J. L. 168, 170; and *Meredith* v. *Perth Amboy*, 63 N. J. L. 520, 522, the last-cited case holding that:

> "This statutory limitation of eighteen months upon the allowance of a prerogative writ cannot be enforced for the protection of an assessment which the legislature could not constitutionally authorize."

And by the law of the state, appellant was within time in bringing the action in the state supreme Court, for the rule to show cause why a *certiorari* should not be granted was made on March 11, 1937, and within the eighteen months succeeding the tax sale as required by Section 14 of "An Act relative to the Writ of *Certiorari*" (Vol. 1 Compiled Stat. 407, as amended by P. L. of 1925, p. 77). (See last page of this brief.)

As to the charge of fraud: The fact remains that the southerly three-fifths part of the 1,010 feet in length of ripa that was apportioned stands assessed by the apportionment for $9,000 per year while the northerly two-fifths part is assessed by the apportionment for $496,000 per year, and we say that is fraud which was calculated to take over one hundred thousand dollars out of appellant's pocket at least inherent fraud. Surely no apportionment act should be so construed that it will enable the person or persons appointed to make the apportionment to increase or decrease the assessed valuations so that an assessment of $500 per foot of frontage on the shore of the two-fifths part is increased from $202,000 to $496,000 per year, while the apportionment of $500 per foot of frontage on the shore of the remaining three-fifths part is decreased from $303,000 to $9,000 per year, unless there was something in the value of the respective prices which was not present here. When the taxes were assessed the value of $500 per foot was there.

The charge that the court of chancery of New Jersey did not have jurisdiction to hear the case, because the appellant here had an adequate remedy at law by certeriori in the state supreme court, and that a municipality, in assessing, levying and apportioning taxes, is within the province of a court of law. In the suit in the lower courts, when the appellant was turned away from the state supreme court, it sought help from the only other available court, the court of chancery of New Jersey, where among the other relief prayed was that the Township be restrained from enforcing the illegal tax sale and apportionment. There were also charges of unconstitutionality in the Apportionment Act, fraud and concealment in the making of the apportionment, over which subjects the court of chancery had jurisdiction. The decision of Vice-Chancellor Backes in *Commercial Co.* v.

Southern Surety Co., 100 N. J. Eq. 92 (affirmed in 101 N. J. Eq. 738) shows that where the jurisdiction of courts of law and equity for the redress of fraud is concurrent, the court of equity should retain jurisdiction in cases where the remedy at law is not as complete as in equity. Cases are cited in the opinion where the courts of chancery retained jurisdiction because of its power of cancellation of an instrument and to grant an injunction. The bill of complaint filed in the court of chancery contained all the allegations necessary in a bill to quiet title under the "Act for Quieting Titles" of March 2, 1870 (4 Compiled Stat. 5399, Sec. 1) and may be said to be a bill *quia timet* as well. *Smith* v. *Cohen*, 123 N. J. Eq. 419. In *Welles* v. *Schaeffer*, 98 N. J. Eq. 31, 33, Vice-Chancellor Backes held that an attack on a certificate of tax sale, if void, is by bill to remove the cloud or bill to quiet title, or, if voidable, by *certiorari*.

The Township and County, appellees, have assumed the position throughout that the commissioners of the township had the right on July 5, 1933, to make the apportionment based on what might *thereafter* occur, and a further proposition that they had the right to disregard the annual assessment of taxes levied for the years 1930 to 1933 against the ripa lot, 4-A, and reduce the annual assessment against the southerly three-fifths part that might be conveyed to the railroad company, from a valuation of $500 a foot to $14 a foot of frontage per year, and add the difference of $291,000 of valuation per year to the two-fifths part that might be retained by the appellant, just because it might retain the rights at some future time to acquire the submerged lands lying in front of the two-fifths part. Such an apportionment was illegal and void, and the court of chancery had the jurisdiction to set it and the tax sale based thereon aside.

Bogert v. *Elizabeth*, 27 N. J. Eq. 568; *Kirkpatrick* v. *New Brunswick*, 40 N. J. Eq. 46, affirmed 41 N. J. Eq. 347; *Smith* v. *Cohen*, 123 N. J. Eq. 419; *Commercial Co.* v. *Southern Surety Co.*, 100 N. J. Eq. 92, affirmed 101 N. J. Eq. 738.

The taxes for the year 1930 to 1933, inclusive, on this whole ripa tract, 4-A, were high and were based on the preferential right existing throughout each of those years in the owner to acquire from the State the adjacent lands under water. They were assessed, as the Exhibits B, C, D and E attached to the bill show (R., pp. 38, 39), according to the frontage of 1,010 feet on the River at $500 per foot a year. The fact that nine months after the making of the apportionment of July 5, 1933, the appellant acquired a new high water line from the State upon which its preferential right would thereafter depend could not be taken into consideration, for, in making its conveyance to the railroad companies, the appellant would convey an easement rather than the fee and would reserve its *riparian* rights for which, and the acreage of land in the rear, it had paid $1,750,000 in the year 1920. (See $1,750 of cancelled revenue stamps attached to deed Ex. 11, R., pp. 312 to 318.)

Given a tract of vacant land of equal length, breadth and value throughout, how could a municipality honestly apportion unpaid taxes thereon other than in accordance with the length of the respective parcels into which it was to be divided. The Apportionment Act of 1919, even if it is not constitutional, provides in its fourth section, that:

> "4. That the apportionment shall be made according to the value of the respective subdivisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of such parcel."

The two-fifths part of this ripa plot retained by the appellant gained no increase in value and the claim that about all but $9,000 of said taxes of $505,000 per year assessed against all of said plot could be chargeable only to that part of it retained by the appellant, known after the apportionment as Plot 4-AB, is preposterous.

In *Fitzgerald* v. *Faunce*, 46 N. J. L. 536, it was held by the court of errors and appeals of New Jersey, in giving consideration to a grant of an easement for the exclusive use of lands "It is a grant of the soil itself and not a mere easement, as it is difficult to understand how the exclusive use could be demised and the land not."

This brings us to a consideration of the charge (on p. 2 of the Appellee's Brief) that they did not make the admission, charged on page 6 of the statement as to jurisdiction filed by the appellant. But a reference to the record will show that they did so admit.—I turn to page 104 of the Record, and there find under heading of "stipulations", which I read to the court (20th line) that "paragraphs 24, 25 and 26 (of the bill) are admitted. 27, 28 and 29 are denied", and it appears in the next line, that Mr. Schloeder said to the court "If the court please, again there, we simply refer to the instruments. He draws conclusions from the instruments, and the instrument of course we admit".

Turning to page 6 of the Statement as to Jurisdiction, I find the part quoted by counsel of the appellee Township, and an examination of Exhibit G (pp. 42 and 43 of the Record), shows the resolution for the apportionment adopted and signed, on July 5, 1933, by three of the township commissioners, apportioning $9,000 per year to the southerly three-fifths part of the plot 4-A, Block 438-C, and known as 4-AA in Block 438-C, and $496,000 per year to the northerly two-fifths of plot 4-A or 4-AB,

in Block 438-C. In making up the Statement as to the Jurisdiction, of course, we did not pretend to quote the facts from the testimony as recorded and so had to condense them. Said Exhibit G proved the allegations of paragraph 28 of the bill (R. 108). Mr. Schloeder said on the argument, made and reiterated before trial, to strike the bill of complaint, that "practically everything can be stipulated except this allegation of fraud" (R. 100). But the paragraph which follows and says, "that the three state tribunals who passed on the question had determined the challenged statement to be without substance", is a fiction, for taking the first, the state supreme court (118 N. J. L. 348 to 352), says (on p. 350):

> "Prosecutors ripa lands had been assessed at $505,000. On July 5, 1933, the assessed valuation was apportioned $9,000 to that part of the tract to be occupied by the railroad company and $496,000 to the portion retained by the prosecutor. The contention of the prosecutor is that the entire assessment, that is to say, $505,000 should have been apportioned upon the basis of the lineal frontage, viz., three-fifths to the railroad company and two-fifths to the prosecutor."

The second court to pass on the question, the court of chancery (Opinion, R. 70 to 74) from which it appears that before the apportionment the ripa tract was known as Plot 4-A, in Block 438-C, which by the apportionment was divided into two pieces, known as the Lot 4-AA, in Block 438-C, and Lot 4-AB, in Block 438-C, * * * (p. 72) and that 4-AB was thereafter assessed at $496,000; and it does not say what it found was assessed by the apportionment on lot 4-AA, but it must have been the remainder, of $9,000.

The third court was the court of errors and appeals, and an examination of its opinion fails to disclose any

reference therein as to the riparian lot which was apportioned (Appendix A to Statement as to Jurisdiction).

As to appendix "A", annexed to appellee's Statement in Opposition, is attached what purports to be all of the testimony of the township assessor, but it takes in only his direct examination, the cross-examination is left out. However, his testimony amounts to saying that he assessed $16,000 for the land, a length of 1,010 feet (p. 239) and a width of 5 to 8 feet, and $496,000 for the ripa rights, but that in 1932 after the State Board of Taxation had reduced the total assessment from $757,500, on the whole of plot 4-A, to $500 per foot, he followed the assessment so made by the State Board. His testimony is contradicted by all the other evidence in the case.

When the amended tax bills were made out, after the apportionment, the bills for 1930 to 1933, inclusive, were dated back and show what this last witness testified to, not an allocation of $16,000 on land for one piece and $496,000 for ripa, but $9,000 for the southerly three-fifths part known as plot 4-AA (R. 366, 367) and $496,000 for the northerly two-fifths part known as plot 4-AB (R. 368, 369). What was the apportionment made for but to divide the unpaid taxes that appeared against the ripa plot on July 5, 1933? It was not to determine, as now claimed by the appellee, how much should be assessed against the land and how much against the ripa.

The next paragraph of the motion (Statement against Jurisdiction, p. 7) to dismiss the appeal states that the appellant retained "all of the valuable riparian rights in the lands constituting approximately 98% of the easement". The efforts of the appellee Township have been to deprive the appellant of its valuable riparian lands, which cost it, in 1920, over $800,000 and since then about $200,000 expended on account of a lease from the state of the lands under water (R. 346 to 355) and hundreds of thousands for taxes, which land it was

not willing to give away to a railroad company and a county. The appellants did not make any agreements in writing with the railroad company or county, but lived up to its verbal agreement and expected them to do likewise.

The acquirement in 1934, after the apportionment was made, of the triangular shaped tract of submerged land, was put through not to help the appellant in any way, but because the railroad company needed a new roadbed 54 feet wide, and it was planned by the county engineer, including a new five foot riparian fringe which, of course, would give the appellant an inferior position in respect to acquiring submerged lands, for even this five feet wide riparian fringe was taken by the railroad for slopes and embankments of their road bed (R. 245, 246).

The Apportionment Act of 1919 is unconstitutional and provides by its fourth section (Statement of Jurisdiction, p. 2) that:

> "The apportionment shall be made according to the value of the respective sub-divisions at the time the respective charges were levied or imposed, unless the claim is justly chargeable only to a particular part of such parcel."

and Chapter 208 of the *General Tax Act* of New Jersey of 1903, provides in Section 31, "that in making apportionments the lands shall be assessed in accordance with the value thereof when the taxes came due". The taxes for 1930 to 1933, inclusive, were past due and unpaid when the County made its verbal agreement and the appellant expected it to live up to the agreement. The $65,000 paid by the County to the appellant was for the damage arising from the change of grade, as shown by the unsigned letter submitted by it to the appellant (R. 338, 339).

Answering the contention, set forth in the last paragraph on page 3 of the adversary's brief, we have to say that the Apportionment Act of 1919, being unconstitutional, the appellant was not obliged to seek recourse to the reapportionment provided by it (*Security Trust Co.* v. *Lexington*, 203 U. S. 323, 333) but had the right to treat it as unconstitutional. The appellant says that if the appellant had been treated honestly and fairly by the Township-Appellee there would have been no trouble. The sale for taxes, of September 12, 1935, amounting to $172,856.59 against plot 4-AB should have been for about $65,000 and for the additional five years, since 1934, about $115,000 more, a total to 1939, inclusive, of $180,000 instead of $376,177.77 as stated on page 4 of opposing brief.

The failure of the appellant to take advantage of the alleged remedy afforded by Sections 6 and 7 of the Apportionment Act is that that Act is unconstitutional, and it did not require that any notice should be given a taxpayer of an apportionment.

The cases quoted by the appellee, namely, *Farncomb* v. *Denver*, 252 U. S. 7; *Pittsburgh* v. *Board of Public Works*, 172 U. S. 32; *Weyerhaueser* v. *Minnesota*, 176 U. S. 550, and *Utley* v. *St. Petersburgh*, 292 U. S. 106; are all based on some law which required a taxpayer or interested party to have notice, before or after the final determination of the amount which had to be paid, so that he could be heard, but that is one reason why the unconstitutional Apportionment Act in the instant case should be condemned.

On page 9 of his brief, the adversary says that the taxpayer was afforded a full and complete hearing upon the merits in the state supreme court, but there again is a question of difference, for the taxpayer says that after the argument, on Saturday, May 1, 1937, of the rule to

show cause before the chief justice, the rule to show cause was denied, but without prejudice to an application to be made to the second branch of the court at Trenton, on May 4, 1937, and the state of the case and brief had to be printed by that time and notice of the argument given, and the argument was heard on May 6, 1937, and in the short time of one-half an hour given to argue the taxpayers' side, the court could not have understood the case. In receiving the brief submitted by my adversary, I find that he says, at page 2 thereof, that the riparian rights which go with the ownership of a ripa consist of a right, upon payment to the state, to fill in the submerged lands in front of the ripa, and that such right was valued in the instant case at $500,000, but I call the Court's attention that the right is more extensive, and that upon a grant of submerged lands by the state to a riparian owner he becomes the owner of the fee to the land lying under water with the enjoyment of same as any other owner of land; and I have yet to see any explanation of why a Township should take such a deep interest in these lands. It can make no difference to the Township what property owners seek to do with their lands or what contracts they make regarding it so long as they keep within the law.

I have made answer to all the points raised. No notice was given the taxpayer in the present case either before or after the apportionment that its lands had been apportioned, and that is where the vice of this unconstitutional act lies, and as the secretary of the appellant taxpayer testified in the suit in the court of chancery: "That 4-AB meant nothing to me as I did not know what 4-AB meant, and although I tried to find out, I was unable to do so" (R. 185). One bill, out of the fifty-two offered into evidence, was stamped "Appor-

tioned by the Board of Commissioners, July 5, 1933. Corrected bill" (R. 175), but the witness testified that the dates 1930, 1931, 1932 and 1933, upon the amended tax bill did not refer to the time they were received by him, but were bills with the old year numbered upon them (R. 184) and when he got bills after the apportionment of 4-AA for $9,000 and of 4-AB for $496,000 he did not know which bill the appellant should pay (R. 185).

The answer to Point B and Point C on pages 4 and 5 of the adversary's brief, is that no notice was called for by the Apportionment Act and appellant had the right to treat it as unconstitutional and not entrust hundreds of thousands of dollars to the township commissioners under Section 9 of that act in order to obtain a reapportionment, and that when appellant learned of the result of the apportionment in February, 1937, there had already been a sale of its lands for taxes.

Point D, on page 5 of the adversary's brief, has already been answered.

When the case of *Moran* v. *Horsky*, 178 U. S. 205, 207, was decided, and even as late as the decision in the case of *Preston* v. *Chicago*, 226 U. S. 447, 450, the Act of December 23, 1914, 38 Stat. 790, of the Judicial Code had not been passed, empowering the Supreme Court to review decisions of state courts sustaining the claim of federal right, in addition to those denying it, but even if that were not so, the *laches* or delay in the *Moran* v. *Horsky* case (*supra*) was fourteen years.

And the same should be said of the decision in *Smith* v. *Adsit*, 83 U. S. 185, and *Pierce Oil Co.* v. *Texas*, 212 U. S. 86, and the cases therein cited.

The taxpayer did not exercise his mandatory right to

have a reapportionment on notice. One reason for its not doing so was that it knew nothing about the apportionment having been made, but if it had known, it would not have exercised the right and paid down a hundred thousand dollars more than it could have been justly taxed.

The appellee has quoted from *Security Trust Co.* v. *Lexington*, 203 U. S. 335, where the taxpayer had a hearing in court before seeking a review in the Supreme Court of the United States and a reduction of about $5,000 had been made in its tax, and therefore it had received all the hearing it was entitled to.

This leaves unconsidered only one case cited by the appellee, namely, *McGregor* v. *Hogan*, 263 U. S. 234, and there the taxpayer had notice.

It is well settled that the jurisdiction of the Supreme Court to review a judgment of a state court, the effect of which is to deny a federal right, cannot be defeated by placing such judgment on non-federal grounds which are plainly untenable.

Postal Telegraph Cable Co. v. *Newport, Ky.*, 247 U. S. 464, 475, 476; *Ward* v. *Board of County Commissioners of Love County, Okla.*, 253 U. S. 17, 22; *Broad River Power Co.* v. *South Carolina*, 281 U. S. 537, 540; *Ancient Egyptian Arabic Order of the Mystic Shrine* v. *Michaux*, 279 U. S. 737, 745; *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282; *Enterprise Irr. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164; *Love* v. *Griffith*, 266 U. S. 32, 33; *Chicago B. & Q. Ry.* v. *Chicago*, 166 U. S. 226.

The law in New Jersey is clear that when a bill of complaint is filed for the enforcement of a legal right, the equitable remedy is not ordinarily barred by a mere acquiescence for a period less than the statutory limita-

tion of law in a similar case. *Massie* v. *Asbestos Brake Co.*, 95 N. J. Eq. 298, 311; *Paterson* v. *East Jersey Water Co.*, 74 N. J. Eq. 49, 97, affirmed 77 N. J. Eq. 588.

The motion to dismiss the appeal or to affirm the decree of the New Jersey Court of Errors and Appeals should be denied.

Respectfully submitted,

CLARENCE KELSEY,
Counsel for Appellant.

Dated, May 25, 1940.